UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

PUBLIX SUPER MARKETS, INC.

AND

JOAQUIN GARCIA, An Individual

AND

TARVIS HOOKS, An Individual

AND

EDGAR LINARTE, An Individual

CASE NOS
12-CA-22753
12-CA-22800
12-CA-22935
12-CA-23171

Karen Thornton Esq., Counsel for
the General Counsel
David C. Hagaman, Esq. &
Kevin Smith Esq., Counsel for
the Respondent
Steve Marrs, Representative for the
Charging Parties

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Miami, Florida, on eight days in October and November 2003.

The charge and amended charge in 12-CA-22753 were filed by Joaquin Garcia on January 21, 2003 and February 21, 2003. The charge in 12-CA-22800 was filed by Tarvis Hooks on February 5, 2003. The charge in 12-CA-22935 was filed by Edgar Linarte on April 7, 2003. And the charge in 12-CA-23171 was filed on July 3, 2003.

A Complaint in 12-CA-22753 was issued on March 19, 2003. A Consolidated Complaint involving cases 12-CA-22753 and 12-CA-22800 was issued on April 29, 2003. A Second consolidated Complaint in cases 12-CA-22753, 12-CA-22800, and 12-CA-22935 was issued on June 30, 2003. Finally, a Third Consolidated Complaint involving cases 12-CA-22753, 12-CA-22800, 12-CA-22935 and 12-CA-23171 was issued on August 28, 2003. In substance, the third Complaint alleged as follows:

1. That on or about April 4, 2003, the Respondent by its supervisors Desmond Tice and

Alvin Pratt, denied the request of Edgar Linarte to be represented by a fellow employee during an interview which he had reason to believe would result in disciplinary action taken against him.

2. That with respect to Joaquin Garcia, the Respondent for discriminatory reasons, (a) issued a written oral warning to him on October 27, 2002; (b) in mid October 2002, rescinded a previously authorized leave without pay; (c) on or about October 29, 2002, issued another written oral warning to him; and (d) on or about January 8, 2003, gave him a low evaluation resulting in a reduction in pay and eliminating the possibility of promotional opportunities.

3. That on or about December 14, 2002, the Respondent, for discriminatory reasons, suspended Tarvis Hooks and thereafter on December 31, 2002, discharged him.

4. That on or about April 4, 2003, the Respondent, for discriminatory reasons discharged Edgar Linarte.

5. That in early June 2003, the Respondent, for discriminatory reasons, failed to assign Garcia to the chart line.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings of Fact

I. Jurisdiction

The Respondent admits and I find that it is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Procedural Issues

The Respondent moved to have these cases adjourned until the Regional Office had completed investigating all pending unfair labor practice charges that had been filed against it. The Respondent's position is that the General Counsel should be compelled, pursuant to the rationale of *Jefferson Chemical*, 200 NLRB 992, to complete all investigations and assert all known allegations against the Respondent in one consolidated proceeding so that the Respondent can face, at one time, all contentions and not have to litigate various allegations in a piecemeal manner. The rule laid out in *Jefferson Chemical Company, Inc.*, is that it is the General Counsel's responsibility to litigate at once, all related issues that could or should have been known at the time of the hearing.

The *Jefferson Chemical* rule is generally cited in conjunction with *Peyton Packing Company, Inc*., 129 NLRB 1358 (1961) where the Board held that that "wherever practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent." Id., 129 NLRB 1358, 1360. The Board noted that "[to] act otherwise results in the unnecessary harassment of respondents." id., 129 NLRB 1358, 1360. The reasoning for the rule was that the General Counsel should not be in a more favored position than Respondents, who are not entitled to "relitigate allegations made against them because they may have mishandled

their defense in the original presentation of the case."

The General Counsel opposed this Motion, asserting, among other things, that given the past history of the Respondent, if legal proceedings had to be held off until all known unfair labor practices were investigated, a trial on any of them could be postponed indefinitely.

In my opinion, this case is governed by the decision in *Cresleigh Management Inc*., 324 NLRB 774 (1997). In that case, the Board held that the General Counsel has substantial discretion in consolidating or severing cases. Moreover, the Board limited the *Jefferson Chemical* rule to the facts of that case. In my opinion, the fact that there were, at the time of this hearing, other potentially meritorious unfair labor practice allegations by person other than the present charging parties, does not warrant adjourning these cases. To do so, would in my opinion, prejudice the rights of the present charging parties (and the Respondent) to a relatively quick resolution of their respective claims on the matters which have been investigated and are therefore ripe for hearing and decision. Accordingly, the Respondent's Motion is denied.

III. Alleged Unfair Labor Practices

(a) Background

The three individuals, Juaquin Garcia, Tarvis Hooks and Edgar Linarte, are relatively long-time employees. The Respondent acknowledges that it was aware that all three have been active on behalf of United Food & Commercial Workers International Union, and its Local 1625.

The facility involved is a 400-employee distribution warehouse in Miami, Florida. The employees involved are warehouse workers. In the warehouse, there are employees called selectors, forklift operators, supervisors and inventory clerks. Also, the Company employs truck drivers. A normal progression for an employee would be to enter as a selector and then move to forklift operator and ultimately to become a truck driver or supervisor. Inventory clerks work in the office and do paper work.

The warehouse, except for certain goods, (usually those selected for store specials and designated as being on the chart line), are handled, from receiving to shipping, on a computerized inventory system called the Dallas system. The warehouse operates on a two-shift basis, with the morning shift handling receiving 80% of the time and shipping 20% of the time; whereas the evening shift does receiving 20% and shipping 80%.

When cases of merchandise come into the warehouse, they are, at some point, coded with a sticker and then assigned, via a computer terminal located on each fork lift, to the fork lift driver to take pallets from the receiving location to where the merchandise will be selected for shipment to the Company's stores. This computerized system, which is monitored constantly by the inventory clerks, allows the Company to track where merchandise is going at any time during the day and night. The Dallas System also, as a secondary function, allows the Company to figure out each forklift drivers' productivity by comparing the time it takes to move a pallet from any place to any other place in the warehouse, to a standard time figured out ahead of time.

On August 28, 2003, Administrative Law Judge Lawrence Cullen, in Case 12-CA-20429 et al, issued a Decision and Recommended Order. This involving a series of charges filed by the

United Food & Commercial Workers International Union, its Local 1625, and employees Tarvis Hooks, Joaquin Garcia and Edgar Linarte. The trial in that case took place in March 2003 and the issues involved Section 8(a) (1) & (3) allegations dating from 1999 to 2002. Although that case is presently pending on appeal, there were certain findings that were not in dispute. These were:

1. Since 1995, the Union has attempted to organize the warehouse employees. Also, the Union was involved in various employment lawsuits. Initially, interest focused within the Hispanic workforce who perceived that Afro-Americans were getting certain employment advantages.

2. One of the first activists was an employee named Mario Eaton who began an in-house group called the Publix Union Brigade and he connected with a person named Steven Marrs, who is an International representative who also was a former employee of Publix. In May 1998, Eaton was fired and after a Complaint issued, (based on charge filed by Union,) that Complaint was settled after a hearing opened on September 8, 1998.

3. After the settlement, interest in unionization renewed and the employees involved at that time were Luis Pacheco, Domingo McCoy, Tarvis Hooks, Miguel Marin, Felix Berrios, Nay Keagler and Joaquin Garcia. These employees began solicitation for the Union by handbilling, home calling, etc.

4. On July 21, 1999, the Union filed a petition for an election and a hearing was held on August 4, 1999. An election was to be held on September 30 and October 1, 1999.

5. On August 8, 1999, the Union sent a letter to the Company identifying its organizing committee members as Pacheco, McCoy, Berrios, Hooks, Keagler, Marin and Garcia.

6. In August 1999, a number of anti-union employees also engaged in hand billing.

7. Before the election, the Union withdrew its petition and the election was cancelled.

8. In or about December 1999 or January 2000, interest in unionization resumed, but union activity was kept secret. Among the people who engaged in home calling were Tarvis Hooks, Pacheco, Miguel Marin, Jefferson Jules, Joaquin Garcia and McCoy.

9. In early 2000, Marrs filed charges with the EEOC. Right to sue letters were issued by the EEOC in July and August 2000. On October 23, 2000, a class action lawsuit was filed and the named plaintiffs were Garcia, Berrios, Pacheco, McCoy, Marin and Lazarus Heredia. (I note that this lawsuit ultimately was dismissed by the Federal District Court as being frivolous and the plaintiffs were assessed costs.

10. During 2001, employees Pacheco, Hooks, Garcia, Marin, McCoy and Jules continued to be active in union organizing efforts.

11. On October 12, 2001, the Union filed another petition in Case 12-RC-8716 and a Decision and Direction of Election issued on December 7, 2001. An election was held on January 3 and 4, 2002, which the union lost. Objections were filed and were consolidated for a

hearing with the Complaint that was issued in 12-CA-20429 et al.

In addition to the undisputed findings, the Administrative Law Judge made various findings and conclusions, some of which involved unambiguous legal questions and were made on credibility findings. However, some findings were based on conduct, which an appellate body might conceivably conclude were not violations of the Act. These were:

1. That in June through early August 1999, the Respondent by its supervisors, Joe Cox and Mike Fitzpatrick, violated 8(a) (1) by their disparate enforcement of an otherwise lawful no-distribution rule. The Administrative Law Judge concluded that while prohibiting pro-union postings on bulleting boards, the Respondent permitted postings for other purposes such as the sales of goods.

2. That in late July or early August 1999, supervisor Alvin Pratt told employees that they should "be careful how we voted and to make the right decisions because they would start shipping work out of the warehouse to nearby warehouses until we didn't have enough work to… justify our plant to be open." Pratt was not called as a witness to rebut the testimony of employees Domingo McCoy and Joaquin Garcia. Therefore, the Administrative Law Judge concluded that the Respondent violated the act by making a threat of plant closure.

3. That in late July 1999 and in September or October 1999, Desmond Tice, the day shift department head, told employees that if the Union were to come in, the forklift operators would not be able to advance to truck driver positions and that seniority would no longer exist. Tice testified that he did not recall making such statements although he did tell employees that truck drivers would not be in the bargaining unit. (They were excluded from the voting unit). Although concluding that there were some inconsistencies among the General Counsel's witnesses, the Administrative Law Judge concluded, based on his credibility resolutions, that there were in fact, two conversations and that Tice unlawfully threatened that if a union came in, the employees would lose the opportunity to be promoted to truck driver positions.

4. That on or about October 27, 2000, the Respondent violated 8(a)(1) by threatening to discharge Joaquin Garcia and Tarvis Hooks for engaging in the protected activity of accompanying a fellow employee, (Jefferson Jules), to a meeting with Distribution Manager, Jack Mosko, where the latter wanted to discuss Jules' work schedule problems. (There was also testimony about this incident in the present case). According to the testimony of the GC's witnesses, Mosko, who thought that Hooks and Garcia were present at the interview for another reason, accused Garcia and Hooks of lying and threatened them with discharge.

5. That on or about March 15, 2000, Mosko threatened to discharge Luis Pacheco. In this regard, the Administrative Law Judge found that Cox and Mosko called Pacheco to the office and another employee, Henry Ferguson, said that he didn't want Pacheco bringing union people to his house anymore. The Administrative Law Judge concluded, based on credibility findings, that Mosko's remarks constituted a veiled threat of discharge against Pacheco for engaging in making house calls on behalf of the Union and that there was no evidence that Pacheco had engaged in any harassing conduct.

6. That in mid October 2001, supervisor Luis Funes, asked Edgar Linarte why he was involved in the discrimination lawsuit, (filed on October 23, 2002), and said that if the workers

did not win the lawsuit, the Company would dismiss them for being dishonest. Funes was not called to rebut the testimony of Linarte and the Administrative Law Judge found that this statement was an unlawful threat of discharge for engaging in protected concerted activity.

7. Based on credibility, the Administrative Law Judge found that in November 2001, various security guards unlawfully prohibited pro-union employees, Garcia, Hooks and Marin from parking in the company parking areas in order to discourage them from distributing union handbills, while permitting anti-union employees to distribute handbills in the parking lot

8. That in December 2001, and shortly before the election, Josue Cardona, the night shift department head and Keith Hankerson, the assistant department head, told employees at a meeting that if there was a union, the employees would not be able to go to supervisors to fix their problems with productivity percentages. The Administrative Law Judge, based on crediting the testimony of Garcia, concluded that this was a violation of the 8(a)(1) in that the statement was tantamount to an assertion that if the Union was selected, employees would lose their existing right to adjust grievances with their supervisors.

9. That in late December 2001, Mosko and Mark Codd, told employees that if the employees selected the Union, they could be called out on strike without notice or vote; that they could be replaced if they went on strike; that employees could lose wages and benefits and equated bargaining as a gamble; that they would start at zero at the commencement of any bargaining; and that their wages were frozen. With respect to this allegation, the Employer's witnesses testified that they used a script prepared in advance and they denied that they made the statements in the manner described by the employee witnesses. The Administrative Law Judge, however, credited the testimony of Pacheco, Marin, Garcia and Hooks and found that the Respondent violated the Act by telling employees that they could be forced out on strikes without a vote; could lose wages and benefits in bargaining; could lose individual rights; that their wages and benefits could start at zero; and that their jobs could be lost.

10. That supervisor Luis Funes, (who did not testify), made threats of discharge in February, March and May 2002. The Administrative Law Judge, held that Miguel Marin credibly testified that right after the election, (January 3 and 4, 2002), Funes told him, "Miguel, now you're only going to have 43 people left because they're going to fire two other people from your Union." Marin also testified that shortly before Tarvis Hooks was fired for the first time on March 15, 2002), Funes told him "they were going to fire a big guy from the Union."

11. That on March 27, 2002, Tanya Brown, the Human Resource investigator held a meeting with Joaquin Garcia to investigate a complaint made by another employee, Renzo Parodi. When Garcia asked Brown if this was an investigation, she said yes, whereupon he said that he wanted a witness. The Administrative Law Judge found that although Brown said OK, she nevertheless continued to ask him questions, thereby ignoring his request. He also concluded that this was a meeting that Garcia reasonably believed could result in discipline and that the Respondent violated the Act by failing to honor his request for a witness. The Administrative Law Judge made this conclusion even though the Respondent made an attempt to repudiate Brown's conduct by posting a memo on May 27, 2002, stating that Brown's failure to afford Garcia a witness was contrary to the Company's policy and may have been unlawful under the NLRA.

12. That the Respondent, for discriminatory reasons, gave an oral warning to Luis Pacheco for tardiness on May 3, 2001. In this respect, the Administrative Law Judge noted that the General Counsel conceded that Pacheco was late on the dates indicated on the May 3, 2001 discipline, but that the Company did not consistently follow its own policy in that his supervisor had not reviewed his attendance and punctuality record with him before Pacheco went over the limit. Given the prior conclusions regarding knowledge, animus and his reliance on the testimony of Linarte regarding Funes post-election comments described above, the Administrative Law Judge concluded that this warning was motivated by anti-union considerations and that because Pacheco's subsequent discharge depended on this warning, as part of the progressive disciplinary system, the discharge also violated the Act.

To summarize, Cullen's conclusions were that (a) this union has attempted, with little success, to organize the employees of Respondent's warehouse since 1998; (b) that the Respondent had knowledge that certain of its employees, including Garcia, Linarte, and Tarvis Hooks, have actively supported the Union; (c) that from about August 1999 to March 2002, a number of managers or supervisors made statements on about 11occasions which, if credited, could be construed as threats of reprisal for employees' union or protected activities; (d) on one or more occasions in November 2001, guards allowed anti-union employees to pass out handbills in the parking lot while prohibiting pro-union employees from parking there; (e) that in August 1999, the Respondent disparately enforced its no-distribution rule; (f) that on one occasion, the Respondent de-facto refused to allow an employee to have a representative at an investigatory interview; and (g) that on one occasion the Respondent, for anti union reasons, issued a warning to one employee which, by virtue of the progressive disciplinary system, resulted in his discharge.

The General Counsel argues that the prior decision demonstrates a pattern of unlawful conduct thereby establishing animus in connection with the allegations of the present case. The Respondent counters that even if the conclusions are upheld, it shows at most, a relatively small group of violations, (and only one illegal discharge) over a 2-½ year period and that although numerous other charges have been filed against the Respondent, most have either been dismissed or withdrawn. The Respondent therefore argues that during the various periods of union organizing, it has largely kept its nose clean and that its managers have tried to stay within the law. [1]

(b) Tarvis Hooks

Tarvis Hooks was employed by Publix since December 1994. As noted above, he had been very active in attempting to unionize the Company; a situation that the Company was aware of. I note that Hooks was one of the Union's observers at the election.

Before talking about the events involved in his case, a brief description of the Company's absenteeism policy is order. Basically, an employee, within a six month period, will receive a discipline if he or she is absent from work on five or more occurrences, (defined as one or more

[1] There also have been a number or unfair labor practice charges that have been filed and resolved by settlements whereby the Respondent did not admit culpability. As such, one cannot make any conclusion about animus from these past allegations.

consecutive days out), or six or more days out, irrespective of the number of occurrences, unless one or more of the absences is "excused." Excused absences are specifically defined as absences for jury duty, military leave, leave pursuant to the Family and Medical Leave Act, (FMLA), approved bereavement leave, authorized vacation time, approved disability leave, participation in certain legal actions, workers' compensation leave and approved deferred status. Absences for any other reason are not excused and can result in the issuance of discipline as part of the progressive disciplinary system if the employee has a sufficient number of absences to meet the criteria described above. (The level of discipline will depend on where the employee stands at the time the discipline is issued). A somewhat amibiguous exception is in cases where the employee is absent because of a medical emergency to himself or to a member of his family even if not covered by FMLA. In that circumstance, the supervisor or manager can, as a matter of discretion, treat the absence as "excused". In cases where a child is taken to the hospital, the Company asserts that if the child stays overnight, that would automatically be covered by the Family and Medical Leave Act and therefore would be one of the listed excused absences.

Hooks had previously been discharged and had filed an unfair labor practice charge in 12-CA-22158 alleging that his termination on March 13, 2002 was unlawful. As a result of a non-board settlement, he was reinstated, with backpay, to the job of forklift operator in late October 2002. In this regard, the Company asserts that it had discovered that there had been an inequitable enforcement of a policy that had resulted in a number of employees receiving warnings and which, in Hook's case, resulted in his discharge because he had, at the time, sufficient warnings so that any additional discipline would result in termination.

In any event, the settlement provided that Hooks be reinstated, that his prior absence record be wiped clean and that his discharge be changed to a leave of absence. Nevertheless, the settlement also provided that Hooks would return to work with a final warning on his record. That warning which was issued on November 11, 2001 meant that under the progressive disciplinary system, if Hooks received *any* additional counselings or warnings, within one year, the next step required his discharge.

One of the issues here is how long the year was to run. Under an old practice, the year would have run from November 11, 2001 to November 10, 2002. But the Company asserts that during the summer of 2002, this rule was changed so that in the event that an employee was absent from work for more than 6 days, (for example on a leave of absence), the period of the absence would be tolled. So, from the Company's point of view, since Hooks was out for several months, the period within his warning would have been extended by the same amount of time.

Hooks testified that he was not aware of this change at the time he entered into the settlement. And in this regard, the Company concedes that the change was not announced to its employee population at the time it was made. On the other hand, Hagerman, the Company's attorney, testified that although he was not directly involved in the Hooks settlement, he spoke to Hooks to finalize the terms in September 2002 and that he told Hooks that his final warning would be extended by virtue of the fact that the settlement provided that Hooks would be treated as if he was on a leave of absence. Hagerman testified that he sent a copy of the policy change to Hooks, along with the proposed settlement by letter dated September 24 and which, according to the Federal Express receipt, was received on September 26, 2002. Hooks, while conceding that he received this letter, testified that he did not receive it until some time after he signed the

settlement agreement on September 26. Although Hooks asserts that he was not aware of the policy change in September, he does concede that he was aware of the change after he returned to work and by November 24, 2002.

Hooks returned to work on September 30, 2002 and he testified that on that date he signed a union card in front of Josha Cardona, a supervisor. He also testified that he received two union authorization cards from other employees in the presence of Cardona.

On the following day, October 1, 2002, Hooks was absent from work, thereby incurring his first absence occurrence. (Not an auspicious start). In short order, he accumulated five occurrences and six absences, which under the Company's attendance policy would, in the normal course of events, automatically result in a warning. These were on October 1st and 4th, a half-day absence on October 27th, an absence on November 14th and 24th and a two-day absence, (one occurrence), on December 11th and 12th.

The General Counsel's contention is that Hooks did not in fact incur five occurrences because his admitted absence on November 24 was excused.

On November 24, Hooks called in to say that he was taking his child to the hospital. Supervisor John Pinto wrote in the logbook that Hooks would not be in. On the following day, Hooks went to work and handed another supervisor, Joe Donneen a copy of a document from Mount Sinai called an "Authorization and General Consent." This document does not, however, indicate anything about an admission or treatment of Hook's child. There also is no evidence to suggest that either Pinto or Doneen told Hooks that the November 24 absence would be treated as an "excused" absence. Since the hospital visit did not involve an overnight stay, it was not an absence automatically excused as an FMLA absence.

Hooks testified that on or about November 30, 2002, he asked Keith Hankerson, two questions; (1) if he could take a week off without pay, and (2) if his absence on November 24 would be treated as an "excused" absence. Hooks testified that Hankerson refused to give him the week off without pay, but that he did say that the November 24th absence would be excused.

Hankerson's version of this conversation is that when Hooks asked him these questions, he told Hooks that he could not have the week off and that the November 24 absence was not excused. And if it was within Hankerson's discretion to treat an absence in this circumstance as excused, it is difficult to believe that given Hook's prior history of absenteeism, Hankerson would have exercised his discretion in Hook's favor. In short, I credit Hankerson.

Despite his rejected request for a week off without pay, Hooks was absent again on December 11 and 12, 2002. This put him over the top in terms of the number of absences and occurrences that would trigger an automatic disciplinary action. (By this time, Hooks was aware that his final warning was still in effect.) As a consequence, on December 13, 2002, Hankerson and Mosko decided to suspend Hooks pending a final determination of his status. Thereafter, as it was determined that Hooks had incurred discipline for exceeding the attendance guidelines, that coupled with his outstanding final warning, put him into an automatic discharge situation. On December 30, 2002, Mosko told Hooks that he was being fired because he had exhausted the progressive discipline policy.

The General Counsel asserts that the Company should have reminded Hooks of his precarious position regarding absences before taking the step of giving him discipline. But the evidence shows that although this sometimes takes place, the responsibility remains with the employees to keep track of their absences and that the Company neither has a policy nor practice whereby supervisors are required or encouraged to give fair warning to the employees.

It is my conclusion that the even if the General Counsel has adduced sufficient evidence to make out a primae facie case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Respondent has met its burden of showing that it would nevertheless have discharged Hooks, despite his union or protected concerted activity.

(c) Edgar Linarte

Linarte was employed by Publix since July 1994. At the time of his discharge he was a forklift operator on the first shift. The Respondent concedes that it was aware that Linarte was an active union supporter. And in the first case involving the Respondent, the Administrative Law Judge concluded that a supervisor, Luis Funes threatened Linarte with discharge. (As noted above, Funes was not called by the Respondent as a witness in that case and therefore did not rebut Linarte's testimony).

As of April 4, 2003, when Linarte was discharged, he had been issued a written warning on April 12, 2002 for an accident in which he ran into another employee with his forklift. Therefore, under the terms of the Company's progressive discipline policy that warning would still be in effect until April 11, 2003.

Before going into the particulars of Linarte's case, one should review the discussion of the Dallas system which is a computerized system designed to track the movement of goods into, within and out of the warehouse. As noted above, a byproduct of the Dallas System is that it enables the Company to measure employee productivity by measuring the time it takes an individual to move items from one place to another against a pre-established time to do each move. The Company contends that Linarte's discharge came about when it discovered that he and another employee, Alfred Neil, were conducting their work in such a way as to dishonestly manipulate the Dallas system so as to give them more credit for productivity than they deserved.

The evidence shows that on March 31, 2003, Noemi Gastelu, an inventory clerk presented superintendent, Joseph Cox documentation that Linarte and Neil had not completed certain assignments despite having entered into the computer that they had completed the assigned moves. She credibly testified that she checked these out by physically going into a certain area of the warehouse called the twilight zone, (where goods are put if their move to their normal slots are not possible to make at the time), and saw that the goods that Neil and Linarte had purportedly moved, were in the twilight zone. As a result, Cox spoke with Desmond Tice, and with the documentation, discovered that the times that both employees had entered to complete the moves, were much shorter than the pre-established times for each move.

Given the report from Gastelu and the time records, Cox and Tice came to the conclusion that both Linarte and Neil had been falsely asserting that they completed the movement of goods in order to lower their average times for doing their work and therefore inflating their

productivity rates. (Productivity is one of several factors used by management to determine rates of pay). Mosko was informed of this and he instructed Tice to talk to Linarte and Neil and see if they had any explanation. Both testified that Mosko reminded Tice, in accordance with written policy, that if either employee asked for a representative during the interviews, one should be provided.

On April 4, 2003, Tice and another supervisor, Alvin Pratt, interviewed Linarte. Although Linarte testified that he asked for a representative to be present, Tice and Pratt credibly denied that such a request was made. (Linarte admitted that on a couple of other occasions when he was involved in an interview, he asked for and was provided with another employee to act as an interpreter or representative). In any event, Tice and Pratt testified that when they questioned Linarte about the "completions" Linarte admitted that on at least one occasion, that he had entered a completion when in fact he had not completed the move. Indeed, Linarte conceded as much during his testimony, but asserts that this was merely a mistake on his part as to one of the five moves that were brought to his attention.

Based on the evidence indicating that Linarte and Neil had entered completions into the Dallas system when they did not, in fact, make the moves and given Linarte's admission during the interview that this was the case with respect to at least one of the assignments, Tice issued what was the equivalent of a two step jump in the progressive disciplinary system to both employees on the theory that these actions involved dishonesty. In Neil's case, this resulted in a written warning. But in Linarte's case, inasmuch as he had a pending written warning, the next level of discipline required that he be discharged.

In light of the above, it is my conclusion that the Company had good cause to determine that Linarte and Neil had engaged in dishonest conduct during the course of their work. It is my opinion that the Company, in giving each of them a two level jump in disciplinary action, acted consistently with past practice. (I note similar issuance of discipline to employees Ray Fernandez and Milot Saintvil). I conclude that the Company had good reason to believe that Linarte had engaged in work place conduct that was reasonably viewed as being dishonest and that the disciplinary actions that it took, both as to him and Neil, were proportionate to the this conduct and consistent with its past practice. I therefore conclude that the Company has not violated the Act with respect to Linarte.

(d) Joaquin Garcia

The Respondent has employed Garcia since 1994. He currently is a forklift operator on the second shift.

There is no dispute that Garcia has been an active union supporter. His support is publicly proclaimed each day by the union T-shirt that he wears. He has solicited union cards, engaged in handbilling, spoken up in favor of the Union at company held meetings to discuss unionization, and has participated in the previously described discrimination lawsuit filed by Marr. Garcia has also engaged in union activity at another of the Respondent's facilities in Deerfield Beach prior to an election conducted there in June 2003.

Except for the incidents involved in the present case, Garcia has had an exemplary record, having received no oral or written warnings.

As previously noted the Administrative Law Judge, in the prior case, found that on or about October 27, 2000, Mosko, threatened Hooks and Garcia with discharge when they appeared with employee Jules to assist him during what they believed was an investigatory interview.

On October 17, 2002 the Company's CEO, Charles Jenkins, Jr., made a tour of the warehouse accompanied by Jack Mosko. The purpose of this tour was to visit the plant and introduce Jenkins to the employees. In the early afternoon, Garcia and another employee, Marin, both wearing union T shirts, spoke to Jenkins and Mosko where Marin complained about various of his work assignment. According to Garcia, when he heard Marin make his complaints, he went over and supported Marin's contentions. Garcia asserts that at one point, he pointed to his union T-shirt and said that the employees needed a union because "you have all the supervisors doing wrong, unfair decisions." Neither Jenkins nor Mosko replied to either Marin or Garcia. They simply walked on.

It should be noted that this incident took place about nine months after the Union had lost the election. There is no indication that at this time, there was any reason for management to be much concerned about a renewal of any significant union sentiment.

According to Garcia, later in the day, at around 8:00 p.m., Hankerson approached him and accused him of using a cell phone while at work. (The evidence shows that employees are not supposed to use phones at work and have, in the past, been disciplined for doing so). Garcia states that he did not use his phone and when Hankerson asserted that he saw him, Garcia denied it. That evening, Hankerson, told Garcia that he was going to receive a written oral warning for using the phone during working hours.

Hankerson's testimony is that he while traveling around the warehouse in a battery operated vehicle called a tugger, he saw Garcia who, while on his forklift, was using a cell phone. He states that when he told Garcia that he was not allowed to use the phone, Garcia put it away, saying he was not using it and then drove away with Hankerson in slow pursuit, telling Garcia to go to the office.

Garcia contends that he did not use his cell phone, although he does acknowledge that he had one with him at the time. He asserts that he and his wife have two cell phones; both in her name, and that on this day he switched with her because she was getting a new phone to replace her old phone. At first, he brought in the phone records of one of the phones, which indicated that no incoming or outgoing calls were made at that number at the time of the incident with Hankerson. Later, Garcia brought phone records for the other phone, but the entries for this did not include October 17. As the Respondent points out, the records although useful in proving that certain calls were made to or from these phone numbers, do not prove that Garcia did not make or start to make a call when Hankerson saw him. For all we know, Garcia could have used a co-worker's phone or was interrupted by Hankerson before he actually made the call.

In the absence of any other witnesses, any finding must be based solely on credibility. Essentially, Garcia's contention is that Hankerson, in retaliation for Garcia's general union activity and specifically for the incident with Jenkins earlier in the day, deliberately fabricated a story in order to get Garcia in trouble. There are several problems with this theory. There is no

evidence that Hankerson, who is a mid level manager, knew of the Jenkins/Garcia incident or that management was put out by Garcia's statements. Further, if management was going to fabricate a pretext to retaliate against Garcia, why do so in such a trivial way that it would result only in a warning and not in his discharge.

I cannot say with any degree of certainty whether Hankerson saw Garcia with a cell phone to his ear. Nor can I say that Garcia did not use a phone on this occasion. As such, even if their respective stories balance each other out, then I must find in favor of the Respondent as the burden of proof rests with the General Counsel. *National Telephone Directory,* 319 NLRB 420, 422 (1995).

The Complaint also alleges that the Respondent rescinded a previously approved three-week vacation that Garcia had scheduled for November 2002.

This story goes back to early 2002 when Garcia had asked for and been granted a one week vacation. (He was entitled, each year, to two weeks of paid vacation and one week of approved leave without pay). However, shortly before he took the time, off he notified the Company that he was going to take this week off under the Family and Medical Leave Act. Because this request was made too late, he received a check for the week. When he got the check, Garcia wanted to give it back on the grounds that he had taken the week off as FMLA leave and not as part of his regular paid vacation time. After a series of conversations with various supervisors about this subject, Garcia was informed first by Josue Cardona and Michael Collins that because the check had been cut and sent, his FMLA leave was not approved. Collins further told Garcia that because he was over the attendance guidelines, he was going to receive a discipline.

The Union filed a charge in 12-CA-22277(3) and during the investigation, the Company, by Mosko and Collins stated that Garcia, despite having taken a week off in February, would be entitled to take a week off "without pay in the future without any problem." As a result of the assurance, the charge was withdrawn.

At various times during the spring and summer of 2002, Garcia notified his supervisor that he was going to go to Cuba for three weeks and they approved this plan. Initially Garcia's request was for three weeks in August, but this was postponed because he hadn't yet received permission from Cuba to enter the country. Finally when he got permission, he purchased tickets for three weeks and told this to Michael Collins who put Garcia's name in the attendance book.

However, when Mosko learned of Garcia's plans, he told Garcia that he was entitled to only one week of paid vacation and one week of unpaid vacation and inasmuch as the vacation he was planning was going to take place during a busy time of the year, (shortly before Thanksgiving), he was not going to approve it.

The record is not clear if Garcia paid back the money he received for the week off in February 2002. If he did, then by November 2002, he should have been entitled to two weeks of paid vacation plus one week of unpaid leave. If he did not, then he should be entitled to only one week of paid vacation, plus one week of unpaid leave. In either case, the promise when the unfair labor practice charge was withdrawn was that he could take a week's worth of unpaid time in the future. That promise did not include a promise that Garcia could take the time off

whenever he wanted. Certainly, the Company did not forgo its right to approve or not approve unpaid time off consistent with its employment needs during particularly busy times of the year.

In the end, Garcia did take his trip and managed to take off three weeks to do so. In this respect, in addition to using the two weeks, he switched a couple of days with another employee and called in sick to take the remaining days off. Therefore, there was no actual injury that Garcia suffered as a result of the alleged rescission of his vacation plans.

In my opinion, the evidence does not show that Mosko rejected Garcia's vacation request because of Garcia's union or protected concerted activity. It seems to me that because of the way that Garcia took off a week in February 2002, with the attendant bookkeeping problems, there was confusion as to the amount of time that Garcia had available to him in November 2002. The Company may or may not have miscounted the time that Garcia had available.

When Mosko told Garcia that he could have two and not three weeks off, Garcia, as he was leaving the office, passed by Joe Cox's office and said: "Thanks for advising Jack." Cox asked Garcia to come into his office but as Garcia was leaving the general office area, he said, "fuck him." This was overheard by some of the women in the office who reported it to Mosko.

The General Counsel argues that Garcia's receipt of a warning for using profanity in the office was improper because Mosko provoked it by illegally refusing Garcia's request for the three weeks off. But as I have already found that this was not motivated by any anti-union considerations, I cannot say that the issuance of an oral warning for using profanity in the office area was inappropriate or unwarranted. I therefore shall recommend that this allegation be dismissed.

On January 8, 2003, Garcia received a performance evaluation that had a lower score than usual. This came about because he had received the two oral warnings described above, (the cell phone and profanity incidents). This lowered his overall score by three points and consequently this reduced his wage rate from the top of the range to the middle of the range. This also resulted in his being ineligible for the time being for promotion to a supervisory job.

Having previously concluded that both warnings were not discriminatorily motivated, I therefore conclude that Garcia's January 2003 evaluation was not discriminatorily motivated. Accordingly, the Respondent was within its rights to reduce his pay and to temporarily disqualify him for a supervisor's job.

Finally, the General Counsel alleges that the Respondent, for discriminatory reasons, failed to assign Garcia to the "chart line" which is a fork lift job that is more desirable even though it does not come with any difference in pay or benefits. The General Counsel asserts that this position should have been given to Garcia because he was the most senior operator on his shift and that the position has traditionally been filled by the most senior operator. But the company's witnesses credibly testified that although seniority plays a role in the sense that the most senior people are generally the most qualified, seniority does not automatically confer a right to this position. In this case, the Company asserts that another employee, Pedro Berrios, was selected for the position because supervisor Josue Cardona believed that he was the most skilled and knowledgeable. In this regard, the Respondent notes that Pedro Berrios was also known by the Company to be an active union supporter.

In my opinion, the General Counsel's evidence is not sufficient to support the contention that Garcia was denied this job because of his union or protected concerted activity.

Conclusions

Given the prior case, it was not unreasonable for the General Counsel to issue the Complaints even though the evidence to support the contentions that the Company acted against these active union supporters in a discriminatory manner was ambiguous.

Nevertheless, it is my conclusion, in accordance with *Wright Line*, supra, that the allegations herein have not been supported by sufficient credible evidence and that in each instance, the Respondent has put forward substantial credible evidence to show that it would have acted as it did, notwithstanding the union or protected activities of Hooks, Linarte and Garcia.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

ORDER

The complaint is dismissed.

Dated

Washington, D.C.

_____
Raymond P. Green
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.